would be financially unable to meet the quantum of damages assessed and ordered to be paid and he accordingly dismissed this limb of the plaintiff's claim. A Notice of Cross Appeal was entered by the plaintiff against this finding, but at the commencement of the hearing of this appeal Mr. Smith, on behalf of the plaintiff, stated that he was not proceeding with this Cross Appeal. It is, therefore, unnecessary to consider this matter further.

It was for these reasons that I was of the opinion that this appeal should be allowed with costs both here and in the Court below.

Appeal allowed.

Solicitors: *Cheang Lee & Ong; Sault, Keith Sellar & Co.*

ABDUL RAZAK v. PUBLIC PROSECUTOR

[A. Cr. J. (Thomson C.J.) December 16, 1960]

[K.L. — Selangor Criminal Appeal No. 68 of 1960]

Criminal Law and Procedure — Possession of property reasonably suspected of having been stolen — Minor Offences Ordinance, 1955, s.29(1) — Possession of transistor radio and silver paper knife — Failure to produce document of title.

In this case the appellant after being questioned by the Police led a Police Officer to a house from where he brought out a "National" transistor radio and a silver paper-knife which he handed to the Police Officer. He said that he got these things from a friend, but who was unable to produce any document of title. On this he was arrested, charged, and sentenced to three months' imprisonment.

Held: the appellant was wrongly convicted. There was nothing inherently suspicious in being in possession of a transitor radio nor was there anything inherently suspicious in being in possession of a silver paper-knife.

Cases referred to:—

(1) *Munusamy* v. *Public Prosecutor* [1937] M.L.J. 93, 94; [1936] F.M.S.L.R. 194, 196.

(2) *Kuan Hing Wah* v. *Public Prosecutor* [1960] M.L.J. 193.

CRIMINAL APPEAL.

K. Chelvanayagam for the appellant.

Raja Abdul Aziz (Deputy Public Prosecutor) for respondent.

Thomson C.J. (delivering oral judgment): This appellant was convicted in the Magistrate's Court at Kuala Lumpur for possession of property reasonably suspected of having been stolen in contravention of section 29(1) of the Minor Offences Ordinance, 1955. He was sentenced to three months imprisonment.

The facts are that in circumstances which do not appear in evidence the appellant was being questioned by the Police at Circular Road Police Station. He then led a Police officer to a house at a certain address. The appellant entered the house. Shortly afterwards he came out with a "National" transistor radio and a silver paper-knife which were handed to the Police officer. He said that he got these things from a friend called Mahayuddin but who was unable to produce any document of title. On this he was arrested. That was the prosecution case.

The material portions of section 29(1) of the Minor Offences Ordinance read as follows :—

"Any person who has in his possession..... anything which may be reasonably suspected of being stolen.....shall, if he fails to account satisfactorily how he came by the same, be liable to..... imprisonment."

In the present case in my opinion the appellant was wrongly convicted.

In the case of *Munusamy* v. *Public Prosecutor*(1) it was said by Terrell Ag. C.J., with reference to the corresponding section of the previous Minor Offences Enactment, which in terms was the same :—

"It is for the Court to be satisfied that the circumstances were such that the police officer had grounds for suspicion that the property in the accused's possession was stolen property and that such suspicion was reasonable."

I dealt with the matter myself recently in the (1960) M.L.J. 193 case of *Kuan Hing Wah* v. *Public Prosecutor*(2). What I said there was this :—

"Before a conviction can be made out under section 29(1) it must be proved in the first place that the property in possession of which the accused person is found is something 'which may be reasonably suspected of being stolen'. That suspicion may, of course, attach to the property in a number of ways. It may arise from the nature of the property, as where a beggar is found in possession of a diamond ring. It may arise from the behaviour of the accused person, as where he runs away when approached by a Police Officer. There must, however, be something in the circumstances which gives reasonable ground for suspicion."

In the present case there was nothing of the sort. There is nothing inherently suspicious in being in possession of what is called a transistor radio nor is there anything inherently suspicious in being in possession of a silver paper-knife. There is no suggestion that these articles had in fact been stolen from anywhere. There was nothing inherently suspicious about the property nor was there anything inherently suspicious about the behaviour of the appellant.

In the circumstances the appeal is allowed and the conviction quashed.

Appeal allowed.

KHOON CHYE HIN v. PUBLIC PROSECUTOR

[C. A. (Thomson C.J., Ong and Ismail Khan JJ.) February 6, 1961]

[Ipoh — F.M. Criminal Appeal No. 21 of 1960]

Criminal Law and Procedure — Murder — Penal Code, s.302 — Evidence of unreliable witness — Rejection of testimony — Misdirection.

The appellant was convicted for murder under section 302 of the Penal Code. During the trial a witness for the defence in cross-examination contradicted his own evidence in chief. With regard to this the learned trial Judge directed the jury thus: "If, Gentlemen, you consider that they were two deliberate contradictions, then you reject the whole of the evidence of that witness. On the other hand, if you think he was nervous and made a genuine mistake, then his credit still stands. It is

entirely a matter for you and puts you back as I see the position to the original proposition I put to you in connection with witnesses: was he telling the truth, or, has he by his contradiction established himself as a liar? If it be the latter, then his evidence must in law be rejected".

Held: the learned trial Judge erred in rejecting the whole of the evidence of the witness because the latter has been proved a liar on one or two points.

The learned trial Judge had prevented counsel from addressing the jury as to the consequences which would ensue if they found the prisoner guilty of murder.

Held: counsel should not be allowed to address the jury as to the consequences of their verdict.

The learned trial Judge had also directed the jury to draw no inference against the prosecution case or the first prosecution witness from the fact that the Deputy Public Prosecutor had not called that particular witness:

Held: the calling of witnesses is a matter for the discretion of the prosecution and in the circumstances of the case the judge was right in directing the jury the way he did.

Observations on the learned trial Judge's direction on the quantum of proof under section 3 of the Evidence Ordinance.

Cases referred to:—

(1) *Ismail bin Abdullah* v. *Public Prosecutor* [1959] M.L.J. 269.
(2) *Liew Kaling* v. *Public Prosecutor* [1960] M.L.J. 306.
(3) *R.* v. *Larkin* [1943] K.B. 174.
(4) *Frampton case*, 21 Cr. App. R. 17.
(5) *Attorney-General for the State of South Australia* v. *Brown* [1960] A.C. 432, 454.
(6) *Sarah Hobson's case*, 1 Lewin 261.
(6A) *In re Goodman's Trust* 17 Ch. D. 266, 297.
(7) *R.* v. *Woodhead* 2 C. & K. 520.
(8) *R.* v. *Cassidy* 1 F. & F. 79.
(9) *Adel Muhammed El Dabbah* v. *Attorney-General for Palestine* [1944] A.C. 156, 168.
(10) *Malak Khan* v. *The King-Emperor* 72 I.A. 305, 314.
(11) *Seneviratne* v. *R.* [1936] 3 All E.R. 36.

COURT OF APPEAL (Criminal).

David Marshall for the appellant.

Syed Othman bin Ali (Deputy Public Prosecutor) for the respondent.

Thomson C.J.: This appellant was convicted for murder in contravention of section 302 of the Penal Code. He appealed against his conviction and on 21st December we set his conviction aside and ordered a re-trial. We said that at a later stage we would state our reasons for quashing the conviction.

It was the case for the prosecution that on the evening of 6th December, 1959, one Tan Hock Choon accompanied by two other men, Tan Twa Tin and Tan Oon Cheok, were going from Kuala Kurau to Kuala Gula. They went part of the way in a motor-car but by reason of a damaged bridge they had to leave their car at a neighbouring house and they then proceeded on foot. After they had gone some distance five people rushed at them, one of whom was the appellant. One of these five men, not appellant, caught hold of Tan Hock Choon and shots were fired. Two days later the dead body of Tan Hock Choon was found about two hundred yards from the road concealed in a drain. There was at least one shot wound and there were a number of incised wounds which could have been caused by an instrument of the nature of a "parang". The cause of death was shock and haemorrhage from the gun-shot wound.

The appellant's defence was one of alibi. He denied all knowledge of the affair. He said that on the evening in question he had been engaged with his elder brother in mending fishing nets and his evidence to this effect was corroborated by his brother.

The case was summed up to the jury at considerable length and with commendable care by the learned trial Judge. That summing-up was attacked before us on a very great number of grounds, most of which were without merit and amounted to no more than the usual complaint that the summing-up was not as favourable to the prisoner as the defence would have liked it to be.

There was, however, one error in the summing-up which in our view was so serious as to compel us to say that the conviction could not stand.

We do not think it is necessary to discuss the evidence beyond observing that the case for the prosecution stood or fell according to the view that was taken of the evidence of the witness Tan Twa Tin.

It was never suggested that in identifying the appellant this witness was not speaking what he believed to be the truth nor was it suggested that he had any motive for not speaking the truth. It was, however, the case for the defence that he was mistaken in his identification of the appellant and this, of course, required that the jury should not only consider his capacity for observation and his opportunities for observation having regard to all the surrounding circumstances including the amount of light available but should also in assessing these matters consider the evidence of the appellant and his brother to the effect that at the material time they were both engaged in mending fishing nets.

Unfortunately from the point of view of the defence on one or two points the story told by the appellant and that told by his brother did not coincide. Moreover, on at least one point, regarding the ownership of the nets that were being mended, the brother in cross-examination contradicted his own evidence in chief.

As regards the discrepancies between the two witnesses, the trial Judge did not apparently consider these to be of very great importance. As regards the contradictions in the brother's evidence, however, he dealt with the matter as follows :—

"I must, however, in connection with the brother's evidence point out to you that if a witness makes contradictory statements either in one lot of evidence or on two separate occasions on matters upon which his testimony is liable to contradiction then his credit is impeached and the whole of his evidence must be rejected.

There can be no doubt that on at least two occasions that witness did contradict himself. ..... If, Gentlemen, you consider that they were two deliberate contradictions, then you reject the whole of the evidence of that witness. On the other hand, if you think he was nervous and made a genuine mistake, then his credit still stands. It is entirely a matter for you and puts you back as I see the position to the original proposition I put to you in connection with witnesses: was he telling the truth, or, has he by his contradiction established himself as a liar? If it be the latter, then his evidence must in law be rejected."

In our view this is wrong and calculated to mislead a jury. If a witness demonstrably tells lies on one or two points then it is clear that he is not a reliable witness and as a matter of prudence the rest of his evidence must be scrutinised with great care and indeed with suspicion. To say, however, that because a witness has been proved a liar on one or two points then the whole of his evidence "must in law be rejected" is to go too far and is wrong.

It was on that ground that we allowed the appeal and ordered a re-trial. There are, however, one or two other matters raised by the appeal regarding which we think we should express our views.

In the first place the summing-up was attacked because the Judge's direction on the question of *quantum* of proof was based on a reading to the jury of the portion of section 3 of the Evidence Ordinance which states the circumstances in which a fact is to be said to be proved. Regarding this, all we have to say here is that we reiterate what we said regarding this type of direction in the cases of *Ismail bin Abdullah* v. *Public Prosecutor*[1] and *Liew Kaling* v. *Public Prosecutor*[2].

Then it was said that in the course of the trial the Judge stopped counsel for the defence from addressing the jury as to the consequences which would ensue if they found the prisoner guilty of murder and it was complained that he was wrong when he dealt with the matter as follows in his summing-up :—

"I stopped Mr. 'X' from making any reference to the punishment for murder. I did so advisedly, Gentlemen, because.....he is not entitled to use that as a means of frightening you from performing your duty. .....is not entitled to impress upon you the punishment which his client would obtain in the event of conviction, and you must — I repeat — must put all questions of punishment out of your minds when you are considering the question of guilt. You are considering whether the accused is guilty: other people consider the ultimate punishment, not us."

Here, in our opinion, the trial Judge was quite right. As was said by Humphreys J. in the case of *Rex* v. *Larkin*[3] :—

"It has always been impressed on juries by Judges, particularly when trying a capital case, that they are not concerned with the consequences of their verdict."

In the case of *Frampton*[4] Avory J. had said this to the jury in the course of his summing-up in a murder trial :—

"The observations of counsel for the defence on the probable sentence were not calculated to assist you, but to deter you from doing your duty. If juries were deterred by such considerations from giving effect to clear evidence the consequences to the public would be serious."

In the Court of Criminal Appeal the Lord Chief Justice referred to this passage in the summing-up and said that criticism of it could not be supported. He observed :—

"It is satisfactory that such appeals to juries on behalf of prisoners charged with capital offences do not always succeed."

Again, in the much later case of *Attorney-General for the State of South Australia* v. *Brown*[5] Their Lordships of the Privy Council (per Lord Tucker at p. 454) made the following observations :—

"The Board were informed that it is common practice for counsel in South Australia in their addresses to juries in murder trials to refer to the consequences of their verdict. If such a practice is permitted it is incumbent upon the Judge to instruct the jury that such matters are not their concern and are completely irrelevant to any issue they have to determine."

It is true, as Mr. Marshall pointed out, that the jury in *Brown's case* were probably more worried about the prisoner not being hanged and the consequent possibility of his being later released and let loose upon society if they found him not guilty because of insanity than with the possibility of his being hanged if he were convicted. There is, however, no distinction in principle.

It was suggested in the present case that counsel may have raised the question of consequences at the trial only with a view to emphasising to the jury the degree of care with which they should consider the case. That may or may not be so. In our view, however, to allow any such argument to prevail would open the door to a very great mischief for on such an argument it would be open to counsel to make the most blatant and offensive appeal to the emotions of the jury under the cloak of impressing them with the importance of their task. In our view, juries are well aware of the seriousness of the cases on which they are called upon to try, particularly in this country where they are only called upon to try capital cases, and it is highly undesirable that defending counsel should address them regarding the consequences of their verdicts. If our views on this point are disregarded it becomes the duty of the trial Judge in his charge to the jury to take such steps as he may think best to undo any harm that may have been done.

Again, it was said by counsel for the defence in his address to the jury that it was better that ten guilty persons should escape rather than that one innocent person should be convicted and it was argued before us that the trial Judge was wrong in dealing with the point in the following language :—

"It has been said to you.....that it is far better that ten guilty men should escape rather than that one innocent man should be convicted. That was a correct statement of the law, Gentlemen, up to approximately three years ago. It is no longer a correct statement of the law standing alone."

In our view if there is anything wrong in this statement it is the suggestion that what was said by counsel was ever a correct statement of the law of England or of this country. It is not a statement of the law. It is a description of it.

As a description it has a long and respectable history going back indeed beyond the beginnings of the law of England.

Trajan said it was better that the crime of a guilty man should go unpunished than that one innocent man should be condemned (Dig. 48. 19. 5 pr.). In the beginnings of the modern English law we have the statement of Fortescue (*De Laudibus Legum Angliac* c. 27) to the effect that :—

> " One would much rather that twenty guilty persons should escape the punishment of death, than that one innocent person should be condemned and suffer capitally."

In *Hale's* "Pleas of the Crown", (Volume 2 — p. 289) we read :—

> " It is better five guilty persons should escape unpunished, than one innocent person should die."

In *Blackstone's* Commentaries (IV — 358) it is said :—

> " The law holds that it is better that ten guilty persons escape than that one innocent suffer."

In the case of *Belaney* (C.C.C. 1844) Gurney B. said :—

> "It is better that many guilty men should escape than that one innocent man should perish."

Yet again it was said by Holroyd J. in *Sarah Hobson's* case[6] :—

> "It is a maxim of English law, that it is better that ten guilty men should escape than that one innocent man should suffer."

Now, it may well be that Sir John Fortescue, writing at a time when a certain xenophobia was not uncommon in England, was more concerned to exalt the legal system of that country at the expense of that of the neighbouring country of France than to prove an exact statement of the law. And it may be that the words of Blackstone, that "somewhat indiscriminate eulogist of every pecularity and anomaly in our system of laws"[6A], rang less hollow in the ears of the students to whom they were addressed than they would have done in the ears of practitioners having practical experience of the English penal law of the XVIII Century and what lawyers of to-day would regard as the ferocity with which it was administered. The truth is that the very words in which the so-called maxim has been expressed at various times themselves make clear that it is not a maxim but a metaphor, a metaphor which enshrines the great truth that if a trier of fact in a criminal case, be he Judge or jury, after making a resolute effort to consider the case as a whole is unable to arrive at a firm conclusion as to the prisoner's guilt then it is his duty to say that the prisoner is not guilty. In other words it is but another way, perhaps a vivid way, of enunciating the presumption of innocence. As such it has been used to English juries many times in the past and will no doubt be used many times in the future. In our view, however, it is not a metaphor that should be used in addressing juries in this country whose native language is not English and who, as we all know, are apt to put a very literal construction on anything said to them by any person in authority whether Judge or counsel.

There is one last point with which we should deal and this arose in the following way. As has been said, one Tan Oon Cheok was probably present when the deceased was killed. This man was not called as a witness at the trial. The circumstances in which he was not called were well-known to the defence although, and this was entirely in the interest of the prisoner, they were never explained to the jury.

A day or two after the killing Tan Oon Cheok made a statement to the Police which gave an account of the killing which was substantially the same as that given at all times by the witness Tan Twa Tin except that it did not implicate the appellant. At the Preliminary Enquiry this witness gave evidence which was materially different from his statement to the Police on a number of points and when that statement was put to him in cross-examination he denied having made it. At the trial counsel for the prosecution stated that he had the witness Tan Oon Cheok in attendance but did not propose to call him although he was available for the defence if they wished to call him. Counsel for the defence made no comment at this stage but merely said he did not wish to call the witness.

At this point it is clear that the Judge, prosecuting counsel and defending counsel all knew why this witness was not being called because they were all in possession of his deposition at the Preliminary Enquiry and of his statement to the Police. He was clearly an untruthful and unreliable witness and if he was called by either side would be so completely discredited in cross-examination by reason of his having told two entirely different stories at different times that the Judge would have been compelled to advise the jury in very strong terms wholly to disregard his evidence.

This, of course, was not within the knowledge of the jury but when the time came for defending counsel to address the jury he commended on the fact that Tan Oon Cheok had not been called and in that connection referred to section 114 illustration (g) of the Evidence Ordinance and apparently invited the jury to presume that the evidence of Tan Oon Cheok if it had been produced would have been unfavourable to the prosecution. In other words he invited them to presume something to be true which he knew to be untrue. We make no

comment on this rather curious piece of advocacy beyond observing that the trial Judge dealt with it correctly in his address to the jury in the following terms :—

" I say to you. Gentlemen, and I say it without fear of contradiction that you can draw no inference against the prosecution case or against the first prosecution witness from the fact that the Deputy Public Prosecutor has not called that particular witness."

It is, of course, well settled that in a criminal case prosecuting counsel, provided there is no wrong motive, has a discretion as to whether or not to call any particular witness and in particular has a discretion not to call in support of his case a witness whom he does not believe to be a witness of truth.

In the case of *Reg.* v. *Woodhead*(7) Alderson B. referred to :—

" The rule which the Judges have lately laid down, that a prosecutor is not bound to call witnesses merely because their names are on the back of the indictment."

He went on to say :—

"The witnesses, however, should be here, because the prisoner might otherwise be misled; he might, from their names being on the bill, have relied on your bringing them here, and have neglected to bring them himself. You ought, therefore, to have them in Court, but they are to be called by the party who wants their evidence."

Again, in the case of *Reg.* v. *Cassidy*(8) Parke B. said that he considered the correct principle was :—

" That the counsel for the prosecution should call what witnesses he thought proper, and that, by having had certain witnesses examined before the grand jury whose names were on the back of the indictment, he only impliedly undertook to have them in Court for the prisoner to examine them, as his witnesses."

In the case of *Adel Muhammed El Dabbah* v. *Attorney-General for Palestine*(9) *Lord Thankerton* referred to the cases of *Woodhead* and *Cassidy* and observed :—

" The prosecutor has a discretion as to what witnesses should be called for the prosecution, and the Court will not interfere with the exercise of that discretion, unless, perhaps, it can be shown that the prosecutor has been influenced by some oblique motive."

The following year the point was again considered in the case of *Malak Khan* v. *The King-Emperor*(10) and Lord Thankerton repeated in effect what he had said the previous year and said :—

" There is no obligation compelling counsel for the prosecution to call all witnesses who speak to facts which the Crown desire to prove. Ultimately it is a matter for the discretion of counsel for the prosecution.'

The question had been considered by the Privy Council some years earlier in the case of *Seneviratne* v. *R.*(11). In that case Lord Roche (at p. 48) referred to a supposed obligation on the prosecution to call every available witness and then observed :—

" Their Lordships do not desire to lay down any rules to fetter discretion on a matter such as this which is so dependent on the particular circumstances of each case. Still less do they desire to discourage the utmost candour and fairness on the part of those conducting prosecutions; but at the same time they cannot, speaking generally, approve of an idea that a prosecution must call witnesses irrespective of considerations of number and of reliability, or that a prosecution ought to discharge the functions both of prosecution and defence. If it does so confusion is very apt to result, and never is it more likely to result than if the prosecution calls witnesses and then proceeds almost automatically to discredit them by cross-examination."

In the present case prosecution counsel had in practice no discretion for it would have been impossible for him to call Tan Oon Cheok without causing prejudice to the prisoner wholly disproportionate to the value of the evidence. Either the witness would have told the story that he told at the preliminary enquiry or he would have told a third story. In any of these events one side or another would have been forced to use his statement to the Police or his deposition to discredit him. In the circumstances it would have been bound to come to the knowledge of the jury that he had made a statement to the Police which although it did not directly implicate the appellant definitely corroborated the surrounding evidence of Tan Twa Tin and this was something which inevitably must have operated to the appellant's prejudice had the jury been in any doubt (as apparently they were not) as to the value of Tan Twa Tin's evidence.

Conviction set aside.
Re-trial ordered.

Solicitors: *S. Seenivasagam & Sons.*

THE COMPTROLLER OF INCOME TAX v. J.K.L.

[O.C.J. (Ambrose J.) February 21, 1961]

[Singapore — Suit No. 1627 of 1959]

Income Tax — Suit for tax — Credit for tax paid and subsequently waived — Income Tax Ordinance (Cap. 166), s.84 — Re-opening of original assessment — Power of the Comptroller.

The Comptroller of Income Tax claimed $457,011.87 for income tax and penalties in respect of the years of assessment, 1951, 1952 and 1953. On February 12, 1960, judgment was given for the Comptroller for $446,505.87, which the defendant admitted to be due: and leave to defend was given as to the residue of $10,506.00.

The sole issue was whether the defendant was entitled to be credited with two sums of $5,252.80 each, which he had paid in respect of the years of assessment, 1948 and 1949.

The facts as regards the amount paid for 1948 were these. On or about December 8, 1948, a notice of assessment assessing tax payable for 1948 at $5,392.48 was served on the defendant, who paid the tax without objection. A sum of $139.68 was subsequently refunded, leaving $5,252.80 as tax paid for 1948. On December 23, 1954, a notice of additional assessment dated December 22, 1954, was served on the defendant, assessing the additional tax payable by him for 1948 at $61,052.20. The defendant objected to the additional assessment, but the Comptroller refused to amend it. The defendant appealed to the Board of Review on July 23, 1957. On February 27, 1958, the Board found that the defendant had $500,000 in certain safes on December 31, 1947, and directed that the additional assessment be revised accordingly. The Board had power to do so under section 80 (10) of the Income Tax Ordinance.

* Section 74(3) of the Income Tax Ordinance provides:

"Where complete copies of all notices of assessment and of all notices amending assessments are filed in the office of the Comptroller, they shall constitute the assessment lists for the purpose of this Ordinance."